

Tuesday, August 12th

Final Decree Transition SWG Members,

Each of you as Final Decree Transition SWG members have engaged in thoughtful dialogue to get us to this stage of the drafted Water Court Division Model. The sub-working group of Abby, Ryan, Judge McElyea, Krista, Anna, and the Governor's Office has integrated the discussion from our July meeting.

We are at the point of determining from each of you, areas of consensus, areas for further discussion, and areas of dissent.

FOR EACH OF YOU

Please review the drafted water court division model recommendations. We are prioritizing the August 16th meeting to solidify areas of consensus and areas needing further discussion or where there is clear dissent.

In the table below, please place your name in either the further discussion/clarification needed OR dissent with rationale and alternative recommendation alongside the relevant section(s).

If you place your name in the further discussion/clarification needed, please also indicate specifically what you are wanting to discuss.

If you place your name in the dissent with rationale and alternative recommendation, please provide specific language along with your rationale that can be shared alongside the drafted recommendations.

If your name is not in one of the columns alongside a section, this indicates you are in agreement/neutral (consensus) with the recommendation.

Please put a 'C' in front of your name below once you have completed your review.

Please let Heather know if you have any questions or would like to discuss any of these sections prior to noon on Friday.

DUE DATE: NOON - FRIDAY, AUGUST 12TH

Please place a 'C' in front of your name once you have completed your review.

C - John Bloomquist

C - Abby Brown

C - Krista Lee Evans

C - Peter Fritsch

C- Andrew Gorder

Thomas Jodoin

Ryan McLane

C - Mike Murphy

C - Mike Roberts

Melissa Schlichting

C - Ronda Wiggers

Section	Title	Further Discussion/Clarification Needed	Dissent with Rationale and Alternative Recommendation
New	Pre-amble		
New	Definitions	Abby formatting comment for legislative drafter, discussion not needed: should “Water Court” and “Water Judge” be capitalized throughout the bill, since defined here?	

3-1-901	Judicial vacancy -- notice	John: Is it necessary to change appointment mechanism?	
3-1-905	Appointments		
3-7-101	Powers and Duties of Water Courts	<p>Abby Comment: Definition (1) says “Water Court” but this section says “Water Courts” in title. Recommend removing the “s” here, and also removing the repeated definition (1st sentence). Just start with “The powers”</p> <p>Abby Comment: Remove (14) as it is a duplicate of (13)</p> <p>Abby Comment on Formatting Question, probably for legislative drafter: Should (17) through (21) be listed as “powers and duties” or do these need to be their own statements?</p> <p>Ronda: Just a question. The first line says “Prior to issuance of a final decree” and then (7) refers to disputes interpreting said decree. Clarify?</p> <p>John: (1)(b) - Does this compromise on motion practice?</p>	<p>Peter Dissent: (13) I do not support giving this power to remote, unelected judges for reasons related to the language in 3-7-211 that I have raised repeatedly. I have provided alternative language for 211</p> <p>Peter Dissent: (18) Wasteful and unnecessary. No such centralized record keeping office exists for the 22 Judicial Districts, why do we need such an office for at most four division water courts? Alternative is no central administrative office.</p>

		<p>John: (2) - change conduct hearings to conduct proceedings</p> <p>John: (5) - Can this be more clear? In other words, can we state the Water Court is the court of competent jurisdiction.</p> <p>John: (6)-(16) - correctly stated?</p> <p>John: (11) - is this different than (2)</p>	
3-7-102	Water Court boundaries		
3-7-103	Promulgation of rules and prescription of forms -- advisory committee		
3-7-201	Designation of water judge	<p>John: (1) - Is this correctly stated?</p> <p>Krista: – To make sure I understand - under (1) one judge could serve in more than one division - correct?</p> <p>Krista: (2) – is 3-1-102 the right reference?</p>	

3-7-202	Terms of office	John: How does 6 year term sync with appointment?	
3-7-203	Vacancies	<p>Mike M: I'm fine with appointment combined with a retention election (if feasible) as long as the Senate confirmation is retained. I would be fine with the appointment and Senate confirmation/re-confirmation alone.</p> <p>Krista: I think that the statewide retention election until we have all final decrees makes sense. This allows us to continue forward with existing judge staffing until there is a greater demand and workload. I feel that the existing retention election is a good compromise.</p>	<p>Ronda: Two issues. First, having both (b) and d(c) are code clutter. They are the same, so there is no reason to repeat it for before and after. Second, I still feel these judges should be appointed and confirmed - not elected. Elections are too expensive to run for a retention vote and by water district doesn't work and statewide doesn't make much sense. It seems the current system of appointment would work until the workload justifies otherwise.</p> <p>Peter: Disagree with statewide elections. Appointment by existing statutory method - a vote of district court judges within the division, with each district getting one vote remains my preferred method</p>
3-7-204	Supervision and administration by supreme court	Ronda: This, taken with 3-7-221 (d) is going to create a large fiscal note. It will likely be projected out many years so it won't affect ending fund balance, but...could cause issues about the cost of funding 4 separate	

		<p>new offices when we have no real idea as to the work load.</p> <p>Krista: Would it be possible to get current funding and FTE from the WC and SC Admin as well as estimated costs with proposal in bill?</p> <p>Krista: This relates a bit to Abby's question on 3-7-101 about the later subsections being stand alone. The office of the Water Court is defined in 3-7-101(18) . In (4) I would say The office of the water court, as provided in 3-7-101(18), or something to that effect so it is more clear.</p>	
3-7-211	Appointment of water commissioners *note two versions of the language	<p>Andrew: Agree with Abby's comments.</p> <p>Mike M: Agree with Abby. Not sure why a division judge would not transfer, but agree it should be a may vs shall.</p> <p>John: Preferred option.</p> <p>Krista: Agree with Abby</p>	<p>Abby: Do not agree with *alternate language* version. Do not agree should be "shall" transfer; the discretion should be with the water court. Do not agree with the "majority rules" premise of subsection (5). Recommendation: go with 3-7-211 as drafted in first version.</p> <p>Ronda: I would like to hear the reasoning behind both of these arguments prior to</p>

			<p>deciding. Just adding my name in this column so you don't have me as "agree"</p> <p>Peter: Do not agree with first version of 211. Support the alternative language</p>
3-7-212	Enforcement of decrees		
3-7-221	Appointment of water judges -- terms of office	<p>Abby: (2)(b) requires the GO to appoint "at least 1 additional" WJ to each remaining division. This is confusing...what if there are 4 sitting water judges at time of assignment under (2)(a). Consider rewording (b) to say something like "If the number of sitting water judges is less than the number of water divisions [or less than four], the GO shall"</p> <p>Mike M: Agree with Abby. Also, after final decrees, Sub Section 2(a) indicates the Governor can assign the sitting water judges to a division of the Governor's choosing for the remainder of their term, which may mean the judge would be required to move. I think this needs to be removed or revised so as to allow the Governor to assign them to the same</p>	<p>Peter: Disagree with appointment by statewide elected official. Prefer existing appointment method of majority of judicial district judges within the water division Also prefer that water division judges be currently elected district court judges, utilizing existing personnel and infrastructure already in the judicial budget, as currently contemplated in statute.</p> <p>Andrew: This is a fairly significant change from existing law that hasn't, to my knowledge, been discussed. Would like to understand the impetus for this new language and the general shift toward executive control over all judicial appts. Also creates conflict with language in 3-7-224, discussing role of MSC. Would propose retaining current system provided in 3-7-221.</p>

		<p>division for the remainder of their term.</p> <p>We may want to discuss the pros and cons of Governor appointment vs Chief Justice appointment.</p> <p>John: Should there be a clear trigger? (i.e. upon certification by Chief Justice all final decrees have been issued?)</p> <p>John: Does this mandate 4 water judges? How do we know?</p>	
3-7-222	Salary – deleted		
3-7-223	Duties of chief water judge		<p>Peter - I disagree that the Chief Water Judge should be able to meddle in the affairs of another duly seated division water judge. If a chief judge is even necessary it should be for interfacing with the legislature regarding issues the division water judges as a whole deem necessary, eg budgeting, personnel requests, etc.</p>

3-7-224	Jurisdiction of chief water judge and associate water judge	<p>Abby: Do not understand why CJ is appointing here, when GO is appointing in all sections above. Intentional or just missed changing this to GO?</p> <p>Ronda: This section seems confusing. Who is doing the appointing until all decrees are final. The Govn as stated above? Or the CJ?</p> <p>Andrew: Second comments above; in addition, subsection (2) should state “all water judges must be appointed pursuant to 3-7-221.”</p> <p>Krista - Agree with Abby. Needs to be consistent with Gov Appointment.</p> <p>John: Should there be a clear trigger?</p> <p>Krista: I think we should discuss John’s concept of a trigger - like certification from Chief Justice or something.</p>	<p>Peter: Disagree with expanding the existing water court’s jurisdiction while the adjudication is ongoing. Many water users and legislators have expressed concern with how long the adjudication is taking. To saddle the court with new responsibilities that few are clamoring to add to the court’s workload runs contrary to those concerns. 85-2-406 currently provides the means to certify questions of water law pertaining to the court’s decrees when needed.</p>
3-7-225	Deleted	<p>Ronda: Are we sure we want to delete the definition of scope of work for an</p>	

		associate judge. Won't there still be associate judges working on adjudication for the near future or do we plan to make them all district water judges?	
3-7-301	Appointment and removal of water masters	Krista: I think it is appropriate to make it clear that the water masters are only applicable in the adjudication.	Ronda: The water master provision seems to be written assuming that they will be working toward final adjudication. The duties do not seem to match what a court would be doing AFTER final decree. Unless we go with the current system of choosing one district court judge to act as the water judge, I do not see a need for the district water judge to also have a master. No one has indicated the work load is going to necessitate this expense.
3-7-311	Duties of water masters	Andrew: Suggest deleting subsections (2) and (3), and adding new subsection (2) "The water master shall assist the water judge in the performance of the water division's further duties as ordered by the water judge."	
3-7-401	Definitions	Abby: should "water judge pro tempore" be removed from (3)? Relic of past draft?	

3-7-402	Disqualification of water judge or master		
3-7-403	Waiver of Disqualification		
3-7-404	Procedure exclusive		
3-7-501	Water Court Jurisdiction	<p>Abby: (1) seems like an incomplete thought....except as otherwise provided for...? Where?</p> <p>Ronda: Are we intending to delete the remainder of the existing language in this section?</p> <p>John: Except as provided for means what?</p> <p>Krista: Maybe reword the end of (1) to read “except as provided by law”. Or something to that effect.</p>	
3-7-502	Jurisdictional disputes		
85-2-112	Department Duties	<p>Abby for leg. drafters: should addition just be “Water Court” (instead of “Water Divisions Court”)</p>	

		Krista: Agree with Abby - water divisions court is not a defined term. Guessing this is a leftover from previous draft.	
85-2-114	Judicial enforcement	<p>Abby for leg. drafters: should additions just be “Water Court” (instead of “Water Divisions Court”)</p> <p>Krista: Agree with Abby - water divisions court is not a defined term. Guessing this is a leftover from previous draft.</p>	
85-2-122	Penalties	Krista: Water court replace water divisions court.	
85-2-123	Deposit of fees and penalties		
85-2-125	Recovery of costs and attorney fees by prevailing party.		
85-2-309	Hearings on objections - jurisdiction	Abby for leg. drafters : should additions just be “Water Court” (instead of “Water Divisions Court”)	

85-2-404	Abandonment of an appropriated Water right		
85-2-405	Procedure for declaring appropriations abandoned	Abby for leg. drafters: should be “an” not “a” for (2) [‘an affected’]	Krista: (2) is a significant change from the existing process. I think this needs to be discussed in more detail.
85-2-406	Supervision of water distribution	<p>Abby for leg. drafters: add “until” after comma in line 10 (“...under part 2 of this chapter, or <u>until</u> the applicable existing...”</p> <p>John: What does subject to application provisions of Title 85, Chapter 20 mean?</p> <p>Krista: (1) Second sentence should refer back to 211 so it is clear it can go to the DC judge.</p>	Ronda: Trying to read these changes against current law is difficult. It seems we are assuming that the Governor will appoint all the district water court judges from within the current water court. What if they do not? Does this still work in adjudication? It might. I just would like to hear from current judge or attorneys before deciding.
85-5-101	Appointment of water commissioners	Abby for leg. drafter: in line 6, should be “...applicable water <u>division</u> ..” not “court” because there is only 1 Water Court. <i>Or delete “of the applicable water court” and leave it</i>	

		<p><i>as “...duty of the water judge having jurisdiction...”</i></p> <p>Abby for leg. Drafter: same comment throughout – should be “...applicable water <u>division</u>..” [not applicable ‘court’]. There is only 1 Water Court.</p> <p>John: What does this mean?</p> <p>Krista: RE Abby comment. I think it should be water division. The Water court is defined as ALL the divisions.</p>	
85-5-102	Appointment of chief commissioner	<p>Abby: Consider removing “of the water court” in first sentence and leave as “When the water judge appoints” <i>or</i> “When the <i>presiding</i> water judge...”</p>	
85-5-103 to end	Changing language to Water Court	<p>Abby: same comment as above for leg. drafters...should not be “applicable water court”, should be “applicable water division” or just “water court” because there is only 1 Water Court.</p>	

		<p>Ronda - no spaces for comments on remaining 25 sections? I continue to recommend that we request 2 bills - one dealing primarily with water court and one with water commissioners. I believe there may be a lot of local concerns with moving the commissioners to one statewide billing/reporting and that could cause the water court changes to not pass. Can they be separated and both still work on their own?</p> <p>Krista: Take out “of the applicable water court”</p>	<p>Ronda: Is 2-4-702 included in the draft to show that a contested issue involving DNRC would go to District Court rather than Water Court? It would seem to me that contested rulings on water involving DNRC should also be in water court.</p>
85-5-110	Appointment of water mediators	John: What does this mean?	
85-5-301	Complaint of dissatisfied user	Krista: (2) should clarify “water” judge. I.e. to a “water” judge who is not supervising . . .	
2-4-702	Initiating judicial review of contested cases	<p>John: I thought the Water Court would handle all PJRs?</p> <p>Krista: This statute would no longer be temporary. (2)(e) needs to be</p>	

		<p>cleaned up - missed the DC language in this subsection.</p> <p>(e)(ii) and (e)(iii) will no longer be necessary.</p>	
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